

REMARKS

This is a Response to the non-final Office Action mailed on December 4, 2010. The Commissioner is hereby authorized to charge any fees that may be required or credit any overpayment to Deposit Account No. 02-1818. If such a withdrawal is made, please indicate the Attorney Docket No. 3712036-702 on the account statement.

Claims 1-14 and 22-25 are pending in the application. Claims 15-21 were previously withdrawn from consideration. In the Office Action, Claim 14 is rejected under 35 U.S.C. §112; Claims 1-14 and 22-25 are rejected under 35 U.S.C. §103(a); and Claims 1-14 and 22-25 are rejected under obviousness-type double patenting. In response, Claims 1 and 14 have been amended. The amendments do not add new matter. In view of the amendments and/or for at least the reasons set forth below, Applicants respectfully submit that the rejections should be withdrawn.

In the Office Action, Claim 14 is rejected under 35 U.S.C. §112, second paragraph, as allegedly being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. Claim 14 has been amended to address the rejection by the Patent Office. The amendment is supported in the specification, for example, at U.S. Patent Publication No. 2007/0110849, paragraph 36. Based on at least these noted reasons, Applicants believe that Claim 14 fully complies with 35 U.S.C. §112, second paragraph. Accordingly, Applicants respectfully request that the rejection of Claim 14 under 35 U.S.C. §112 be withdrawn.

In the Office Action, Claims 1-3, 5-6, 8, 10-14 and 22-25 are rejected under 35 U.S.C. §103(a) as being unpatentable over WO 01/22837 to Kuslys et al. ("*Kuslys*") in view of EP 0904784 to Van Hoey-de-Boer et al. ("*Van Hoey-de-Boer*"). Claims 1-3, 5-6, 9-14 and 22-25 are rejected under 35 U.S.C. §103(a) as being unpatentable over EP 1048226 to Kratky et al. ("*Kratky*") and *Van Hoey-de-Boer*. Applicants respectfully traverse the rejections for at least the reasons set forth below.

Applicants have amended independent Claim 1 to recite, in part, an infant or follow-on formula comprising a source of proteins, a source of lipids, a source of carbohydrates, a probiotic and a calcium/phosphorus weight ratio ranging between 1.4 and 3. The amendment is supported in the specification, for example, at U.S. Patent Publication No. 2007/0110849, paragraph 37. In

an embodiment, the claimed infant or follow-on formula provides a unique combination of protective nutrients ensuring growth and metabolic patterns similar to those of breastfed infants, with the intention of enabling similar health characteristics to be enjoyed in later childhood and adulthood. The claimed infant or follow-on formula presents a reduced load on immature organs and favors the natural growth of Bifidobacteria and other beneficial microflora in the large intestine of breastfed infants.

Kuslys, Kratky and *Van Hoey-de-Boer* alone or in combination fail to disclose or suggest each and every element of the present claims. *Kuslys, Kratky* and *Van Hoey-de-Boer* alone or in combination fail to disclose or suggest an infant or follow-on formula comprising a calcium/phosphorus weight ratio ranging between 1.4 and 3 as required by Claim 1. *Kuslys* and *Kratky* merely list calcium and phosphorus as optional ingredients. *Van Hoey-de-Boer* fails to disclose or suggest the use of any calcium. As a result, *Kuslys, Kratky* and *Van Hoey-de-Boer* fail to teach or even recognize the benefits of an infant or follow-on formula having a calcium/phosphorus weight ratio in accordance with the present claims.

What the Patent Office has done is to rely on hindsight reconstruction of the claimed invention. Applicants respectfully submit that it is only with a hindsight reconstruction of Applicants' claimed invention that the Patent Office is able to even attempt to piece together the teachings of the prior art so that the claimed invention is allegedly rendered obvious. Instead, the claims must be viewed as a whole as defined by the claimed invention and not dissected into discrete elements to be analyzed in isolation. *W.L. Gore & Assoc., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1548, 220 USPQ 303, 309 (Fed. Cir. 1983); *In re Ochiai*, 71 F.3d 1565, 1572, 37 USPQ2d 1127, 1133 (Fed. Cir. 1995). One should not use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 F.2d at 1075. (Fed. Cir. 1988).

Accordingly, Applicants respectfully request that the obviousness rejections in view of *Kuslys, Kratky* and *Van Hoey-de-Boer* be reconsidered and the rejections be withdrawn.

Claims 4 and 7 are rejected under 35 U.S.C. §103(a) as being unpatentable over *Kuslys* and *Van Hoey-de-Boer* in view of the publication to Holm ("*Holm*") and the publication to Ishibashi et al. ("*Ishibashi*"). Claim 9 is rejected under 35 U.S.C. §103(a) as being unpatentable over *Kuslys* and *Van Hoey-de-Boer* in view of *Kratky*. Claims 4 and 7 are rejected under 35

U.S.C. §103(a) as being unpatentable over *Kratky* and *Van Hoey-de-Boer* in view of *Holm* and *Ishibashi*. Applicants respectfully submit that the patentability of Claim 1 as previously discussed renders moot the obviousness rejection of Claims 4, 7 and 9 that depend from Claim 1. In this regard, the cited art fails to teach or suggest the elements of Claims 4, 7 and 9 in combination with the novel elements of Claim 1.

In the Office Action, Claims 1-7, 10-13 and 22-25 have been provisionally rejected under the judicially created doctrine of obviousness-type double patenting over Claims 1, 6-13 and 20 of copending Application 10/564,805. Claims 8 and 14 have been provisionally rejected under the judicially created doctrine of obviousness-type double patenting over Claims 1, 6-13 and 20 of copending Application 10/564,805 further in view of *Kuslys*. Claims 9 and 14 have been provisionally rejected under the judicially created doctrine of obviousness-type double patenting over Claims 1, 6-13 and 20 of copending Application 10/564,805 further in view of *Kratky*. Applicants respectfully submit that, at this state of the prosecution, it would be premature to file a terminal disclaimer because the instant claims have not yet been allowed, and thus, the final version of these claims is not yet known. However, upon allowance of the pending claims, Applicants will consider filing a terminal disclaimer relative to Application 10/564,805.

For the foregoing reasons, Applicants respectfully request reconsideration of the above-identified patent application and earnestly solicit an early allowance of same. In the event there remains any impediment to allowance of the claims which could be clarified in a telephonic interview, the Examiner is respectfully requested to initiate such an interview with the undersigned.

Respectfully submitted,

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